No. 94-581

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1994

FOSS MARITIME COMPANY,

Petitioner,

vs.

DAVID ETTINGER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS F. FRIEDBERG
Counsel of Record
SARAH L. BUNGE
LAW OFFICES OF
FRIEDBERG & BUNGE
Attorneys for Respondent
402 West Broadway
25th Floor
San Diego, California 92101
(619) 557-0101

5859
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Does the Supreme Court have jurisdiction over a matter in which the Court of Appeals does not have jurisdiction because the matter is an interlocutory order rather than a final decision of the District Court?

2. Did the District Court have jurisdiction to determine whether the "unique circumstances" doctrine was applicable to this matter?

3. Was the District Court correct in applying the "unique circumstances" doctrine, which was formulated by this Court as an exception to the Federal Rules of Civil Procedure, Rule 6(b) provision prohibiting extensions of time, where Ettinger filed his motion for new trial beyond the time limit provided by Rule 59(b) because he relied on the District Court's order extending that time period?

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RESPONDENT'S BRIEF IN OPPOSITION

David Ettinger (hereinafter "respondent') respectfully opposes Foss Maritime Company's (hereinafter "petitioner") petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF JURISDICTION

This Court does not properly have jurisdiction of this matter, which is an appeal of the District Court's interlocutory order granting a motion for new trial. As the Ninth Circuit Court of

Appeals properly determined, this matter does not involve a final decision and, therefore, no appellate jurisdiction exists.[1]

STATEMENT OF THE CASE

Respondent filed his complaint on March 9, 1992, alleging unseaworthiness under general maritime and admiralty law and seeking maintenance and cure. Respondent's complaint further alleged causes of action for negligence under the Jones Act, 46 U.S.C. § 688 and general maritime and admiralty law. The issues regarding respondent's claims for maintenance and cure were bifurcated from the negligence and unseaworthiness claims. It was agreed that the maintenance and cure issues would be resolved in a bench trial after the conclusion of the jury trial on the other claims.

On November 2, 1993, the negligence and unseaworthiness claims came to trial before a jury. Judgment was entered on the jury verdict in favor of petitioner on November 17, 1993. Judgment in Civil Case, Appendix 1 to Petition for Writ of Certiorari. Respondent filed a motion on November 20, 1993, seeking enlargement of time within which to file a motion for a new trial under Federal Rules of Civil Procedure, Rule 59. *Ex Parte* Application for Order Enlarging Time to File A Motion for New Trial, Appendix 2 to Petition for Writ of Certiorari. Petitioner did not raise any jurisdictional issue or advise the court or respondent of any authority prohibiting enlargement of the time to file a motion for new trial.

On November 23, 1993, the District Court granted respondent's motion and issued an order enlarging the statutory time for respondent to file his motion for a new trial. Order, Appendix 2 to Petition for Writ of Certiorari. Pursuant to the District Court's order, and in reliance on it, respondent filed his

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1. *See* argument under Reasons for Denying the Writ, Point I, page 3.

motion for a new trial within the time period ordered by the District Court. On February 23, 1994, the District Court entered an order granting respondent's motion for a new trial. Order Granting Plaintiff's Motion for New Trial, Appendix 3 to Petition for Writ of Certiorari.

Petitioner then filed a notice of appeal and request for stay of all proceedings with the United States Court of Appeals for the Ninth Circuit. Petitioner's request for stay was denied on March 4, 1994. On March 29, 1994, the Ninth Circuit dismissed the appeal, ruling that the order for new trial was an interlocutory decision and that petitioner's contention was the District Court was without jurisdiction to grant the motion was without merit. Order, Appendix 4 to Petition for Writ of Certiorari.

On April 12, 1994, petitioner filed a motion for reconsideration of the order dismissing its appeal with the United States Court of Appeals for the Ninth Circuit. On July 1, 1994, the Ninth Circuit Court of Appeals denied the motion for reconsideration. Order, Appendix 5 to Petition for Writ of Certiorari. Trial of respondent's maintenance and cure claims is still pending.

REASONS FOR DENYING THE WRIT

I.

THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THIS MATTER.

The threshold question in a petition for writ of certiorari is whether the District Court's order was an appealable order and, therefore, whether the matter was properly "in" the Court of Appeals. It is well-settled that if a Court of Appeals lacks jurisdiction because there has been no final judgment, the Supreme

Court also lacks jurisdiction to consider the matter. *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897); *see also, Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740, 744-45 (1976).

In the *Liberty Mutual* case, this Court held that the only authorization for an appeal from a District Court's order is pursuant to 28 U.S.C. §§ 1291 or 1292. This Court further held that in cases where issues of damages or other relief remain to be resolved, a decision rendered by the District Court is necessarily an interlocutory order and is not appealable. *Liberty Mutual* at 744. Respondent's right to damages and other relief has still to be resolved because a new trial has been ordered on the issues that were submitted to the jury. Moreover, the court has not yet rendered a decision on the separate matter of respondent's right to damages and other relief on his claim for maintenance and cure, which was not submitted to the jury but was to be determined later by the court.

The Ninth Circuit Court of Appeals correctly held that it does not have jurisdiction in this matter because an order granting a motion for a new trial is clearly not a final appealable order. *E.g., Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985). Moreover, the District Court's order obviously does not fall within the few specific types of interlocutory decisions that are appealable pursuant to 28 U.S.C. § 1292. The Court of Appeals did not have jurisdiction to hear the appeal because there was neither a final appealable order nor a final judgment of respondent's right to damages and other relief. Therefore, this Court also lacks jurisdiction to hear this matter.

II.

THE DISTRICT COURT HAD JURISDICTION TO HEAR AND GRANT RESPONDENT'S MOTION FOR NEW TRIAL.

This Court enunciated the doctrine of "unique circumstances" as an exception to the Federal Rules of Civil Procedure, Rule 6(b) which prohibited the trial court from extending the statutory time limits for *both* filing motions for new trial *and* notices of appeal. The doctrine is now well-established and has been further refined by this Court. *E.g., Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964).[2]

By necessity, the District Court must have jurisdiction to determine whether "unique circumstances" exist which warrant an

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2. The *Thompson* case involved an appeal which was not filed within the time period allowed by Federal Rules of Civil Procedure, Rule 73(a). In that case, the petitioner had failed to file his motion for new trial within the 10 day time period imposed by Rule 59. The trial court declared that it was timely but denied the motion for new trial on its merits. In reliance on the trial court's statement regarding the timeliness of the new trial motion, the petitioner filed his notice of appeal within 60 days of the trial court's denial of his motion for new trial (over seven months after entry of judgment).

At the time of the *Thompson* decision, the Rule 6(b) prohibition on time extensions applied both to motions for new trial and notice of appeal. The Federal Rules of Appellate Procedure had not yet been promulgated and Rule 73(a) of the Federal Rules of Civil Procedure provided that a notice of appeal must be filed within 60 days from the entry of judgment or alternately within 60 days from the date of an order denying a *timely* motion for new trial under Rule 59. At the time of the *Thompson* decision, Rule 6(b) specifically stated that the court "may not extend the time for taking any action under rules . . . *59(b)* . . . *and 73(a)* . . . except to the extent and under the conditions stated in them."

exception to the Rule 6(b) prohibition of time extensions. A court must always have jurisdiction to determine whether it has jurisdiction to hear a particular matter. *See, e.g., United States v. United Mine Workers of America*, 330 U.S. 258 (1947). The District Court in this matter clearly had jurisdiction to determine whether the "unique circumstances" doctrine was applicable and, thus, whether respondent's motion for new trial could be considered timely. Once a court has determined that it has not been deprived of jurisdiction, it may proceed with the case. *Ruby v. Secretary of the U.S. Navy*, 365 F.2d 385, 389 (9th Cir. 1966).

After the District Court found that sufficient unique circumstances existed, respondent's motion was deemed timely and the court then had jurisdiction to hear the motion for new trial. The District Court then properly exercised its jurisdiction to hear respondent's motion for new trial and granted the motion. The order granting the new trial is interlocutory and, therefore, neither petitioner's notice of appeal nor his petition for writ of certiorari have transferred jurisdiction and it remains with the District Court pending final judgment on all claims. *Cf. id.* at 388.

III.

EVEN ASSUMING ARGUENDO THAT APPELLATE JURISDICTION CU[illegible]ENTLY EXISTS IN THIS MATTER, THE EXER[illegible]ISE OF JUDICIAL DISCRETION TO GRANT A PETITION FOR A WRIT OF CERTIORARI SHOULD BE RESERVED FOR SPECIAL AND IMPORTANT SITUATIONS AND IS NOT WARRANTED IN THIS MATTER.

Rule 10(1) of the Rules of the United States Supreme Court states that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion" and should be granted only "when special and important reasons" exist. The rule also provides

guidance as to the type of situations which are sufficiently "special and important" to warrant this Court's review on a writ of certiorari. The following four grounds apply to cases which have been litigated in federal court.

> 1. A United States Court of Appeals has rendered a decision that conflicts with the decision of another circuit on the same matter or with a state court of last resort.
>
> 2. The exercise of this Court's power of supervision is necessitated because a United States Court of Appeals has drastically deviated from the accepted and usual course of judicial proceedings or has approved such drastic departure by a lower court.
>
> 3. The petition involves a United States Court of Appeals decision on an important matter which has not been settled by this Court, but should be.
>
> 4. A United States Court of Appeals has rendered a decision on a federal question that conflicts with controlling decisions by this Court.

None of these grounds constitute a basis for granting review in this case and review by this Court is simply not necessary.

A. Petitioner Has Not Demonstrated Any Conflict Among the Circuit Courts as to the Ability of the Trial Court to Extend the Time to File a Motion for New Trial Under Rule 59(b).

Federal Rules of Civil Procedure, Rule 6(b), provides that a

court may not extend the time for taking any action under Rule 59(b). The circuits all recognize the validity of the Federal Rules of Civil Procedure so there is no conflict for this Court to resolve on that issue. The question in this case is not whether a trial court has the ability to extend the time to file a motion for new trial under Rule 59(b), but whether the "unique circumstances" exception to Rule 6(b) is applicable once the court has issued an order extending the time and a party has relied on that order.

Petitioner contends that there is a conflict between the circuits as to whether the "unique circumstances" doctrine can be applied to create an exception to the Rule 6(b) provision prohibiting the court from extending the various statutory time periods references in the rule. Petitioner's contention is flawed for several reasons. First, this Court initially formulated and subsequently applied the "unique circumstances" doctrine to create an exception *to the Rule 6(b) prohibition. See Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, 387 (1964). *See, supra,* footnote 2.

Second, petitioner has not cited authority which establishes that there is, in fact, any conflict between the circuits on the issue of whether the doctrine should be applied after the court has determined that proper circumstances for its application exist. Petitioner has merely cited *Eady v. Foerder*, 381 F.2d 980 (7th Cir. 1967), a case where the court found that sufficiently "unique circumstances" existed and some cases where no such circumstances were found to exist. There is not a conflict merely because different facts require different results. Petitioner has not demonstrated any actual conflict.

B. Petitioner Has Not Demonstrated Any Conflict Among the Circuit Courts or Within the Ninth Circuit as to Whether the Question of Jurisdiction Is Appealable.

Petitioner next contends that there is a conflict among the

circuits as to whether a party may appeal an interlocutory order under circumstances where the trial court had no jurisdiction to issue the order. There is certainly no conflict and no question that lack of jurisdiction is always subject to review, however, that is not even the issue involved here. In this case, both the District Court and the Ninth Circuit found that the District Court had jurisdiction to grant respondent's motion for a new trial under the "unique circumstances" doctrine. The District Court applied the "unique circumstances" doctrine and found that respondent's motion should be deemed timely filed. The Court then exercised its jurisdiction to hear and determine the motion. Contrary to petitioner's contention, there was no "extra-jurisdictional grant of a motion for new trial" because the District Court had jurisdiction.

Petitioner also contends that when the Ninth Circuit dismissed its appeal, the dismissal was inconsistent with other Ninth Circuit opinions such as *Eaton v. National Steel Products Co.*, 624 F.2d 863 (9th Cir. 1980). Petitioner contends that "review is necessary to establish uniformity on the issue of appealability". Again, the cases cited by petitioner do not establish any conflict either among the various circuits or within the Ninth Circuit. The uniform rule is well established that an order granting a new trial is interlocutory in nature and not appealable. That was, in fact, the holding in this case as well as in the *Eaton* case. *Id.* at 864. Moreover, respondent's remedies on the maintenance and cure issues have not yet been tried in this case, and, therefore, an appeal of part of this case would violate the longstanding policy against piecemeal appeals. *See, id.*

There has been no "drastic deviation from the accepted and usual course of judicial proceedings" or any other special and important reason which would necessitate this Court's review.

IV.

THE TRIAL COURT AND NINTH CIRCUIT COURT OF APPEALS HAVE APPLIED THE "UNIQUE CIRCUMSTANCES" DOCTRINE AS DICTATED BY THIS COURT.

This Court held in *Thompson, supra,* that an otherwise untimely appeal would be acceptable because the appellant had relied upon the District Court's statement that appellant's motion for new trial had been filed in "ample time." The purpose behind this ruling was to allow the appeal to be heard on its merits and not be dismissed for procedural reasons when the appellant has relied upon the court's statement regarding the timing of an appeal.

Petitioner argues that this Court "narrowly limited" the *Thompson* holding to its facts in *Osterneck v. Ernst & Whinney,* 489 U.S. 169 (1989). The reason this Court did not apply the "unique circumstances" doctrine in *Osterneck* was that there was not any evidence of affirmative representations by the District Court to petitioners that their appeal was timely filed nor did the petitioners ever seek such assurance from the District Court or the Court of Appeals. *Id.* at 178-79.

Likewise, in the other cases cited by petitioner the critical consideration was whether a court had explicitly assured a party that their motion would be filed in a timely manner, not whether the document being filed was a motion for appeal or a motion for a new trial. *See In Re Slimick,* 928 F.2d 304, 309 n.7 (9th Cir. 1990) ("the bankruptcy court neither explicitly extended the deadline for appeal nor specifically assured appellants that the appeal period would not begin until entry of findings. *Id.*).

In *Eady v. Foerder,* 381 F.2d 1366 (7th Cir. 1967), the court applied the "unique circumstances" doctrine to deem timely the

filing of a motion for a new trial under Federal Rules of Civil Procedure, Rule 59(b). Petitioner argues that this case has been severely criticized within its own circuit citing, *Bailey v. Sharp*, 782 F.2d 1366, 1369-74 (7th Cir. 1986), and *Varhol v. National RR Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990).

What petitioner neglected to point out to this Court is that the opinion of the court is not the slightest bit critical of the "unique circumstances" doctrine or the *Eady* case. The only criticism occurs in the *concurring opinion* of Judge Easterbrook. *See Bailey* at 1369-74. In *Bailey*, the court applied the "unique circumstances" analysis and found that there was no reliance on any statement by the court so the motion could not be deemed timely filed. The Seventh Circuit held that the doctrine cannot apply when "counsel understand in fact that a motion for a new trial must be filed within 10 days." *Bailey* at 1369. The Seventh Circuit approved *Eady* and stated in the majority opinion that "*Eady* holds that when a judge extends the time within which to file an application for a new trial, and counsel relies to his detriment on that extension, the "unique circumstances" of this reliance allow the court to dispose of the matter before it." *Id.* at 1368. *Eady* adopted an equitable exception to a rigid time limitation when a lawyer relied on an "affirmative misstatement of a district judge." *Id.* The Seven Circuit's statements in *Bailey* can hardly be considered a criticism of *Eady*.

In *Varhol*, the full court heard the case *en banc* to consider whether to overrule *Eady*. A majority of the court as constituted did not vote to overrule *Eady* and the court stated "it remains as the law of this Circuit." 909 F.2d at 1560. In regards to the "unique circumstances" doctrine, the court stated that it was bound to follow *Thompson* and it would not speculate regarding *Thompson's* demise. This speculation would be inappropriate as the Supreme Court rejected a "unique circumstances" argument in *Osterneck* by distinguishing rather than overruling *Thompson*. *Id.* at 1562.

Thus, the cases regarding the *Eady* holding and the "unique circumstances" doctrine have been decided uniformly throughout the Seventh Circuit. Likewise, petitioner has failed to present a direct conflict among the circuits regarding the "unique circumstances" doctrine. The "unique circumstances" doctrine is a viable doctrine applied uniformly throughout the circuits when the facts of a case justify its utilization.

V.

THIS COURT HAS ALREADY SUPPLIED GUIDANCE UNDER *THOMPSON* AND ITS PROGENY AS TO THE APPLICATION OF THE "UNIQUE CIRCUMSTANCES" DOCTRINE.

In *Thompson,* this Court set out three factors to be considered when deciding if the "unique circumstances" doctrine is applicable to a case. These factors are: (1) whether the party did an act, which if properly done, postponed the deadline for filing the appeal, (2) if the District Court concluded these acts had been done properly, and (3) if the party relied on the District Court and filed the appeal within the assumed new deadlines, but beyond the old deadlines. *Thompson,* 375 U.S. at 387, 11 L. Ed. 2d 404. These factors are sufficient guidance as to the application of the "unique circumstances" doctrine.

While this Court has not specifically stated that the "unique circumstances" doctrine would apply to a motion for new trial under Federal Rules of Civil Procedure, Rule 59(b), such a specific statement is unnecessary because the doctrine was established as an exception to Federal Rules of Civil Procedure, Rule 6(b). *See supra,* footnote 2. The equitable policy behind the "unique circumstances" doctrine which prevents a party from being penalized for relying on a court's misstatement of the law is equally applicable under this situation. The Seventh Circuit has

already held this in the *Eady* case. Petitioner has not cited any case that has rejected this holding. Therefore, as this Court has already set clear guidelines for applying the "unique circumstances" doctrine and as there is not a conflict among the circuits, the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny petitioner's petition for writ of certiorari.

Respectfully submitted,

THOMAS F. FRIEDBERG
Counsel of Record
SARAH L. BUNGE
LAW OFFICES OF
FRIEDBERG & BUNGE
Attorneys for Respondent
402 West Broadway
25th Floor
San Diego, California 92101
(619) 557-0101